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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

QUALITEX COMPANY,
Appellant,
v.
JACOBSON PRODUCTS CO., INC.,
Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF DR PEPPER/SEVEN-UP CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

I. Whether the Lanham Act prohibits the registration of color as a trademark.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. WHAT IS A TRADEMARK?	4
II. COLOR AS A TRADEMARK	8
A. Is Color a Device?	8
B. Can Color Identify and Distinguish Goods and Services and Indicate Their Source?	9
III. COLOR AS A REGISTRABLE TRADEMARK	11
A. The Plain Language of the Lanham Act Permits Registration of Color Trademarks	11
B. The Law's Evolutionary Nature Requires Reversal of the Ninth Circuit's Decision	15
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (CA2 1976) 7
Belt v. Hamilton National Bank, 108 F.Supp. 689 (1952) 15
Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956) 18
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 15
Coach Leatherware Co. v. AnnTaylor, Inc., 933 F.2d 162 (CA2 1991) 6
Co-Rect Products, Inc. v. Marvy! Advertising Photography, Inc., 780 F.2d 1324 (CA8 1985) 6, 7
DAP Products, Inc. v. Color Tile Mfg., Inc., 821 F.Supp. 488 (S.D. Ohio 1993) 10
Diamond Match Co. v. Saginaw Match Co., 142 F. 727 (CA6 1906), *cert. denied*, 203 U.S. 589 (1906) 17
In re E. I. DuPont DeNemours & Co., 476 F.2d 1357 (CCPA 1973) 11
In re Owens-Corning Fiberglas Corp., 774 F.2d 1116 (CAF 1985) 9, 10, 18
Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982) 6
Kelly v. Robinson, 479 U.S. 36 (1986) 15
Master Distributors, Inc. v. Pako Corp., 986 F.2d 219 (CA8 1993) 10
Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) 15
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 15
Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189 (1985) 12
Qualitex Co. v. Jacobson Prods. Co., 13 F.3d 1297 (CA9 1994), *cert. granted*, 129 L.Ed.2d 935 (U.S. 1994) (No. 93-1577) 2, 10, 13
Qualitex Co. v. Jacobson Prods. Co., 21 USPQ.2d 1457 (C.D. Cal. 1991), *aff'd in part and rev'd in part, remanded*, 13 F.3d 1297 (CA9 1994), *cert. granted*, —— U.S. ——, 129 L.Ed.2d 935 (U.S. 1994) (No. 93-1577) 9

TABLE OF AUTHORITIES—Continued

Page

Truck Equipment Service Co. v. Fruehauf Corp., 536 F.2d 1210 (CA8 1976), *cert. denied*, 429 U.S. 861 (1976) 5, 17
Two Pesos, Inc. v. Taco Cabana, Inc., —— U.S. ——, 112 S. Ct. 2753 (1992) 2, 6, 7
United States v. Heirs of Boisdore, 8 How. 113, 12 L.Ed. 1009 (1849) 15

STATUTES

S. Rep. No. 100-515, 100th Cong., 2d Sess. 44 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577 9
S. Rep. No. 1333, 79th Cong., 2d Sess. 5 (1946) 4, 12
15 U.S.C. § 1051 2
15 U.S.C. § 1052 12
15 U.S.C. § 1114 14
15 U.S.C. § 1127 ..... 5, 8, 11

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TABLE OF AUTHORITIES—Continued

	Page
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Lüscher, *The Lüscher Color Test*, 15 (Ian Scott ed. & trans., Pocket Books 1971) (1969)	10
Murphy & Rowe, *How to Design Trademarks & Logos* 8 (1988)	5, 6, 17
Sacharow, *The Package as a Marketing Tool*, 47 (1993)	11
United States Patent and Trademark Office, *Trademark Manual of Examining Procedure*, § 1202.04(e) (2nd ed. 1993)	9
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Webster's New World Dictionary 169 (3d ed. 1988)	5

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BRIEF OF DR PEPPER/SEVEN-UP CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF THE *AMICUS CURIAE*

The *amicus*, Dr Pepper/Seven-Up Corporation ("Dr Pepper"), is an international manufacturer and distributor of soft drink products and enjoys substantial goodwill and renown for these products. Dr Pepper has generated and fostered its national and international goodwill and renown of its **DR PEPPER** brand products through, among other devices, the use of its unique maroon color. This color serves as a distinctive symbol of Dr Pepper's national and international goodwill and renown. The color serves to distinguish Dr Pepper's products from those of its competitors. It assists the present day consumer in expediting the shopping process when purchasing **DR PEPPER**. This is particularly true in our multilingual world, where color as a trademark is a uni-

versal language, especially in the realm of consumer products.

Dr Pepper has a compelling interest in legal issues concerning the scope of trademark rights under the Lanham Act (15 U.S.C. § 1051 *et seq.*) in general, and the protectability of color *per se* under the Act in particular. This case involves fundamental issues of statutory interpretation of the Act and whether color, an important visual stimulus in distinguishing consumer products, can be protected under the Act. The *per se* rule prohibiting registration of color under the Lanham Act stated in the opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") below in *Qualitex Co. v. Jacobson Prods. Co.*, 13 F.3d 1297 (CA9 1994) *cert. granted*, 129 L.Ed.2d 935 (U.S. 1994) (No. 93-1577), threatens and obstructs the ability of Dr Pepper to enjoy the benefit of its proprietary rights in its distinctive maroon color. That decision also weakens Dr Pepper's ability to defend its corresponding goodwill.

Moreover, the Ninth Circuit's blanket prohibition of registration of color *per se* unduly restricts the statutory language of the Lanham Act in a manner that violates both the language and intent of the Act. Without any statutory basis, the *Qualitex* court relegates color as a mark and symbol of goodwill to a "nether region", wholly apart from registrable marks, by articulating a *per se* standard precluding protection of color alone that is separate from the statutory standard for all other species of marks. Such a judge-made exclusion ignores this Court's interpretation of the Act stated in *Two Pesos, Inc. v. Taco Cabana, Inc.*, —— U.S. ——, 112 S. Ct. 2753 (1992). This Court's interpretation makes clear that unless a particular species of mark is excluded from the Act, any mark which has become distinctive of a company's goods or services in commerce may properly be considered for registration. *Id.* at ——, 112 S. Ct. at 2757. Accordingly, color, if distinctive of a company's goods or services in commerce, may be considered for registration.

Dr Pepper takes no position on the issue of whether Appellant's color mark was entitled to registration under the Lanham Act and was properly registered. Dr Pepper believes, however, that the language of the Lanham Act clearly provides that color marks may be registered when the statutory requirements for registration are satisfied. Hence, the *Qualitex* ruling of the Ninth Circuit, if permitted to stand, will limit one of Dr Pepper's fundamental and valuable proprietary rights. It will also subject Dr Pepper and other companies possessing a proprietary interest in a color alone from enjoying an ability to enforce such interests uniformly throughout the United States. As a consequence, hard-won goodwill will be easily diverted and lost. In addition, a universally effective means of distinguishing one company's goods or services from those of another will be rendered ineffective.

SUMMARY OF ARGUMENT

The definition of the term "trademark" under the Lanham Act contains no express or implied restriction prohibiting color *per se* as a device from being a trademark. This broad, permissive definition comports with not only the Congressional mandate which is embodied in the Lanham Act, but also is consistent with the reality of the marketplace today, where time is at a premium and competition for consumer attention and confidence is burgeoning.

Because color may be a trademark, it must also be registrable upon the principal register created by Congress to facilitate the national protection of trademarks as commercial symbols. To hold otherwise would do violence to both consumers who would be subjected to confusion as well as to those who invest in color as an indicium of origin of their products or services.

ARGUMENT

Before the Court today is the question of whether the Lanham Act prohibits the registration of color as a trademark. The definition of a trademark is squarely at issue. The Court must determine whether color as a device is protected under the Act, or whether past notions and precepts espoused under different times and circumstances should compel a strained interpretation of the Act to exclude color from registrability. Such an interpretation and application of the Lanham Act denies the law its plain meaning and precludes its application to the current realities of the marketplace.

I. WHAT IS A TRADEMARK?

A trademark serves many purposes which benefit both consumers who purchase goods or services as well as the companies who offer goods or services for sale.

> Full and fair competition requires that those who invest time, money and energy into the development of goodwill and a favorable reputation be allowed to reap the advantages of their investment. (Citations omitted.) As the legislative history of the Lanham Act states:
>
> > Trade-marks, indeed, are the essence of competition, because they make possible a choice between competing articles by enabling the buyer to distinguish one from the other. Trade-marks encourage the maintenance of quality by securing to the producer the benefit of the good reputation which excellence creates. To protect trade-marks, therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not. Senate Report No. 1333, 1946 U.S. Code Cong. Serv., p. 1275.

Truck Equipment Service Co. v. Fruehauf Corp., 536 F.2d 1210, 1215 (CA8 1976) *cert. denied*, 429 U.S. 861 (1976).

A trademark is defined broadly to include, with certain limited exceptions, any word, mark, symbol, or device used in commerce which identifies and distinguishes goods and services and which indicates that they emanate from a single source:

> The term "trademark" includes any word, name, symbol, or device, or any combination thereof—
>
> (1) used by a person, or
>
> (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter
>
> to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

15 U.S.C. § 1127.

In commercial terms, trademarks are "brands" [1]. They perform multiple functions benefiting their owners and the consuming public. "They:

- *Identify* a product or service or organization.
- *Differentiate* it from others.
- *Communicate* information as to origin, value, quality.
- *Add value*—at least in some cases.
- Represent potentially *valuable assets.*
- Serve as important *legal properties."* [2]

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[1] *See, e.g., Webster's New World Dictionary* 169-171 (3d ed. 1988); Michael Finn, *Color Me Trademark*, Editor & Publisher, Dec. 4, 1993, at 4T.

[2] John Murphy & Michael Rowe, *How to Design Trademarks & Logos* 8 (1988).

"Brands allow the consumer to shop with confidence, and they provide a route [or road] map through a bewildering variety of choice." [3]

Brands do not simply describe qualities or characteristics. If this were so, then the mere description of a product would be considered a brand. It is not. A brand must package meaning *and* communicate that meaning in a shorthand fashion. Brands must make the consumer's choice easier. Thus, in a commercial marketplace filled with overwhelming choices [4], the consumer must be afforded the ability to rely upon brand identification for making product selections without the need for a feature-by-feature analysis that would otherwise be required.[5]

Translated into legal terms, the attainment of brand identification is known as "secondary meaning". "Secondary meaning is an association formed in the minds of the consumers between the mark and the source or origin of the product." *Co-Rect Products, Inc. v. Marvy! Advertising Photography Inc.*, 780 F.2d 1324, 1330 (CA8 1985). *See also, Two Pesos, Inc. v. Taco Cabana, Inc., supra,* —— U.S. at ——, 112 S. Ct. at 2757; *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 851 n.11 (1982); *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 168 (CA2 1991).

The strength of a trademark to act as a source identifier or to possess secondary meaning has been expressed by courts as a four-category spectrum ranging from symbols or devices which are not capable of developing secondary meaning to those which are inherently distinctive or which inherently possess secondary meaning. *Two Pesos, Inc.*

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[3] *Id.* at 12.

[4] Statisticians report that every person in the U.S. is exposed to 1500 brands per day, or at least 93 brands per hour or 1.5 brands per minute. Finn, *supra*, note 1, at 4T.

[5] Alexander L. Biel, *How Brand Image Drives Brand Equity*, 32 Journal of Advertising Research, RC-6, Nov.-Dec. (1992).

v. Taco Cabana, Inc., supra, —— U.S. at ——, 112 S. Ct. at 2757; *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (CA2 1976). These categories are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful. *Two Pesos, Inc. v. Taco Cabana, Inc., supra,* —— U.S. at ——, 112 S. Ct. at 2757; *Co-Rect Products Inc. v. Marvy! Advertising Photography, Inc., supra,* 780 F.2d at 1329.

> A generic mark is one that refers to the common name or the nature of an article, and most courts hold that it is not entitled to trademark protection. . . . A descriptive mark designates the characteristics, qualities, effects, or other features of the product, and is protectable only if shown to have become distinctive, that is, shown to have acquired secondary meaning. . . . Suggestive marks, which require imagination to reach a conclusion as to the nature of the goods, and arbitrary or fanciful marks, which are inherently distinctive, are entitled to immediate protection, without establishing secondary meaning. . . .

Id. (Citations omitted). *See also, Two Pesos, Inc. v. Taco Cabana, Inc., supra,* —— U.S. at ——, 112 S. Ct. at 2757. As a consequence, in order for a mark to perform a trademark function, it must be distinctive or possess secondary meaning.

In a commercial context, secondary meaning is not merely the hollow identification of source, but represents symbolically the qualities and characteristics of a particular product from a particular source and, ultimately, the embodiment of a faith in the consistency of those qualities and characteristics. Brand imagery may evoke in a consumer's mind a particular flavor, strength, and freshness which are consistent unit-to-unit, day-to-day, week-to-week, month-to-month, and year-to-year.

The meaning of any trademark is not a singular message, but a blend of multiple messages that invites con-

sumers to make particular product choices. Thus, a brand communicates information upon which the consumer relies. A brand which successfully indicates a particular, albeit anonymous, source and communicates information relevant to any purchasing decision must be protected under the law. Otherwise, consumers will be punished for their reliance upon commercial symbols and will inevitably be deceived by confusingly similar brands. Furthermore, companies who invest in establishing their brands or trademarks will be stripped of that investment and any goodwill that flows from it.

II. COLOR AS A TRADEMARK

This Court must determine whether color *per se* can be a device in which secondary meaning can develop and to which consumer loyalty and confidence can attach.

The Lanham Act provides, in part, that a device may be a trademark if it meets the other requirements of Section 45 of the Act. 15 U.S.C. § 1127. The definition of a trademark has two basic elements. A trademark must:

(1) Be a "word, name, symbol, or device, or any combination thereof" used by a person; and

(2) Identify and distinguish such person's goods, including a unique product, from those manufactured or sold by others and indicate the source of the goods, even if that source is unknown.

Id. This definition of "trademark" is sufficiently broad to include color, provided that color is shown to identify and distinguish the user's goods.

A. Is Color a Device?

The legislative history of the Lanham Act, as set forth during Congressional consideration of the Trademark Law Revision Act of 1988 ("TLRA"), makes clear that color can be a symbol or device within the meaning of Section

45 of the Act. In enacting the TLRA, Congress broadened the Lanham Act's original definition of a trademark "to reflect contemporary marketing practices and to make clear a trademark's function of distinguishing the goods of one person from those of another." S. Rep. No. 100-515, 100th Cong., 2d Sess. 44 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5607. Congress expressly chose not to disturb the Patent and Trademark Office's practice of registering color marks under *In re Owens Corning Fiberglas Corp.*, 774 F.2d 1116 (CAF 1985) if the statutory requirements for registration were met: "[t]he revised definition intentionally retain[ed] . . . the words 'symbol or device' *so as not to preclude the registration of colors*, shapes, sounds or configurations where they function as trademarks." *Id.* (emphasis added).[6]

B. Can Color Identify and Distinguish Goods and Services and Indicate Their Source?

The simple answer, as exemplified by Petitioner Qualitex, is "yes". *See Qualitex v. Jacobson Products Co.*, 21 USPQ.2d 1457, 1461 (C.D. Cal. 1991) *aff'd in part and rev'd in part, remanded* 13 F.3d 1297 (CA9 1994), *cert. granted* —— U.S. ——, 129 L.Ed.2d 935 (1994). The district court in *Qualitex* held: "The duration of its exclusive use of the green-gold color on its press pad, the significant amount of sales for over 30 years, and the 'image advertising' . . ., all demonstrate that the Qualitex press pad has acquired secondary meaning." *Id.* Other

[6] *See also*, United States Trademark Association, Trademark Review Commission, *Report and Recommendations to U.S.T.A. President and Board of Directors*, 77 Trademark Reporter 375, 421 (1987) (recommending against deletion or narrowing of the terms "symbol, or device" to preclude registration of such things as color, shape, smell, sound, or other configuration which function as a trademark); United States Patent and Trademark Office, *Trademark Manual of Examining Procedure*, § 1202.04(e), at 1202-13 (2nd ed. 1993) (stating that "color can function as a trademark if it is used on goods in the manner of a trademark and if it is perceived by the public as identifying and distinguishing the goods on which it is used and indicating their source").

courts have likewise recognized that color alone, in appropriate circumstances, can serve to identify and distinguish goods or services and indicate their source. *Master Distributors, Inc. v. Pako Corp.*, 986 F.2d 219, 223 (CA8 1993); *In re Owens-Corning Fiberglas Corp., supra,* at 1127; *DAP Products, Inc. v. Color Tile Mfg., Inc.*, 821 F. Supp. 488, 492 (S.D. Ohio 1993).

In fact, color plays a dramatic role in the marketplace today:

> While color has always surrounded mankind on every side and subjected him to its influence since time immemorial, it is only comparatively recently that we have been able to produce and use color as freely as we do today. Before the 19th century, only a limited number of dyes and pigments were known . . . . Now there are literally thousands of colors of every imaginable hue and intensity. . . .[7]

This makes the palette of human expression today remarkably more capable of communicating with immense subtlety through the use of color.

If one assumes that advertising is a mirror of the times, then one is struck by the multitude of human diversity in this country and worldwide. The diversity of American citizens based upon language, culture, age, education, and other demographic criteria make universally comprehensible communication virtually impossible.

However, color is one of the few modes of communication which touches all but the few who cannot experience it. Color is an unspoken medium that transcends language, age, cultural, social, and educational barriers

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[7] Max Lüscher, *The Lüscher Color Test* 15 (Ian Scott ed. & trans., Pocket Books 1971) (1969). *See also, Qualitex Co. v. Jacobson Prods. Co., Inc.*, 13 F.3d 1297, 1302 (CA9 1994) (acknowledging countless number of shades available).

that otherwise inhibit or thwart communication. Because color is virtually a universal language, it communicates a myriad of meanings.[8] Therefore, color can possess secondary meaning and identify a product as emanating from a unique source. "A study of newspaper advertising showed that color increases comprehension up to 73% and sells products and orders more effectively by 50 to 85%."[9]

"Color differentiates objects to the eye independent of their form."[10] It delivers images. If the use of a color by a person evokes images that create an association in consumers' minds between a product and its source, that color possesses secondary meaning. As such, it is a trademark under Section 45 of the Act. 15 U.S.C. § 1127.

III. COLOR AS A REGISTRABLE TRADEMARK

A. The Plain Language of the Lanham Act Permits Registration of Color Trademarks.

The definition of a trademark is unequivocal in the liberal strokes of the creative brush of the Legislature. *See In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1360 (CCPA 1973). Given the legislative history of the Lanham Act reflecting the contemplation of color as a device, there is no doubt that color is capable of being a trademark.

Once one acknowledges that color is capable of being a trademark, the inquiry shifts to the registrability of color. Section 2 of the Act states: "No trademark by which the goods of the applicant may be distinguished

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[8] Ronald Alsop, *Color Grows More Important in Catching Consumers' Eyes*, Wall St. J., Nov. 29, 1984, at 33; Bernice Kanner, *Color Schemes*, New York, Apr. 3, 1989, at 22-23.

[9] Virginia Johnson, *The Power of Color*, Successful Meetings, June 1992, at 87-90.

[10] Stanley Sacharow, *The Package as a Marketing Tool* 47 (1993).

from the goods of others shall be refused registration on the principal register on account of its nature" except for the reasons enumerated in the statute.[11] 15 U.S.C. § 1052.

The plain language of Section 2 makes clear that *all* trademarks may be registered, provided they do not fall under one of the listed exclusions and provided further that proper application has been made therefor. *Id.* Thus, because color is capable of being a trademark, it must be registrable under Section 2 of the Act, provided it does not fall under any of the enumerated exceptions.

If color, when applied in a particular case, such as the one before the Court, does not fall within one of these exceptions, then this Court must afford color the possibility of becoming a registered trademark *capable of being enforced throughout the United States.* The capacity of a trademark to be registered and enforced nationally must be without limitation by arbitrary and inconsistent decisions if it is to fulfill the mandate of the Congress in enacting the Lanham Act. That mandate is "to provide national protection for trademarks used in interstate and foreign commerce. S. Rep. No. 1333, 79th Cong., 2d Sess., 5 (1946). . . . Because trademarks desirably promote competition and the maintenance of product quality, Congress determined that 'a sound public policy requires that trademarks receive nationally the greatest protection that can be given them.'" *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 193 (1985) (*quoting id.* at 6).

The commercial world today compels the elimination of the outdated "color depletion" theory and the concern

[11] Section 2 of the Lanham Act prohibits a registration of (a) scandalous or immoral matter, (b) national symbols, such as the U.S. flag, (c) the name or portrait of a living person without consent, (d) marks which are confusingly similar to previously registered marks, and (e) marks which are descriptive, geographically descriptive, or deceptively misdescriptive. *See* 15 U.S.C. § 1052.

about "shade confusion" which courts often misuse in thwarting the broad intent of the Lanham Act to protect valid trademarks.[12] The archaic "color depletion" theory and the notion that shade confusion analysis is too difficult for a court to perform have once again diverted a court from the clear language of the Lanham Act and its application in the current commercial marketplace.

The Ninth Circuit cites the color depletion theory by referring to a primary color preclusion, which clearly did not apply to the facts of the case before it. Moreover, the court below states the truism that there are "countless shades of colors" and that these countless shades cannot be depleted. *Qualitex Co. v. Jacobson Prods. Co., supra,* 13 F.3d at 1302. Thus, the Ninth Circuit plainly recognized that the color depletion theory does not present a *per se* preclusion of color as a registrable trademark.

However, after presenting its inconclusive position regarding the color depletion theory, the Ninth Circuit relies on "shade confusion" to buoy its view of the "better rule" of *per se* preclusion of color as a registrable trademark. The court simply refers to unspecified and "unnecessary problems" in drawing distinctions based on shade confusion. *Id.* Thus, in one bold stroke the Ninth Circuit

[12] The court below stated: "We conclude that the better rule is that a trademark should not be registered for color alone. As many cases have noted, under the color depletion theory, no person should have a monopoly on a primary color. We recognize that there are countless shades of colors that could not be depleted, but then, we could well become involved in 'shade confusion' . . . [citations omitted]. Drawing distinctions between close shades of color could present unnecessary problems. Adequate protection is available when color is combined in distinctive patterns or designs or combined in distinctive logos. . . . Furthermore, as we discuss hereafter, further protection is afforded by the Lanham Act's unfair competition provisions." *Qualitex Co. v. Jacobson Prods. Co.*, 13 F.3d 1297, 1302 (CA9 1994) (citations omitted).

cited a *per se* preclusion rule for color based solely on some unspecified difficulty in shade confusion analysis.

This ruling denies the essence of a trademark—secondary meaning. If a color has attained secondary meaning, it is recognized by consumers as an indicator of source. If consumers perceive the color in this fashion, then they can be deceived by an unfair competitor who uses a confusingly similar color on the same or related goods. If the consumer can be deceived, then the Lanham Act must be invoked because the Act's mandate is to provide national protection for trademarks.

The same problems exist in determining whether two color shades create a likelihood of confusion just as they exist in making that determination regarding other types of trademarks: Does the use of the allegedly infringing mark create a likelihood of consumer confusion, mistake, or deception as to product source? 15 U.S.C. § 1114. The issue is simply whether the use of a similar color on the same or related goods is likely to confuse a consumer. The consumer's likely state of mind on seeing the marks in the marketplace is the test. The analysis that must be performed by a court or a jury is the same for color as for any other species of mark.

The well worn theories or notions that caused the Ninth Circuit to avoid what it recognized as the clear mandate of the Lanham Act must be reversed. Affording color the ability to be tested in the crucible created under the Lanham Act for the determination of registrability of trademarks is explicitly required by statute, legislative mandate, and legislative history. In addition, allowing color to serve as a trademark and be protected through registration is compelled by the commercial environment that uses brands as vehicles on which consumers rely in selecting products. This reliance is based on familiarity with a device—color—that conveys the meanings necessary to make those decisions.

B. The Law's Evolutionary Nature Requires Reversal of the Ninth Circuit's Decision.

> "The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth."

Belt v. Hamilton National Bank, 108 F. Supp. 689, 690 (1952) (*quoting* Cardozo, *The Growth of the Law*, at 20). "Of course, the 'starting point in every case involving construction of a statute is the language itself'. But the text is only the starting point." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (*quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). " '[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole and to its object and policy.' " *Id.* at 43 (*quoting Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) (*in turn quoting Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) (*in turn quoting United States v. Heirs of Boisdore*, 8 How. 113, 122, 12 L.Ed. 1009 (1849))).

The environment in which the law is applied is a critical element in the analysis and application of the law to the facts—the judicial function. The Court must not treat the law as static, but, instead, must ever look to the "life of the law". Life implies growth, and growth implies development and application in tune with the world.

What, then, is the world of the marketplace like today? In the current consumer marketplace, shopping can be intense and hurried:

> [S]hopping can be a remarkably intense experience. In . . . [a] brief 5 seconds of your shopping experience the package becomes the ultimate selling vehicle. The package is the message. The package is the product you will ultimately select or perhaps ignore

> and pass by . . . . The package is what grabs the shopper's attention and within those precious 5 seconds the package has to communicate a wealth of information.[13]
>
> [O]n a very practical level, consumers like brands because they package meaning. They form a kind of shorthand that makes choice easier. They let one escape from a feature-by-feature analysis of category alternatives, and so, in a world where time is an ever-diminishing commodity, brands make it easier to store evaluations.[14]

Today, saving time takes priority over saving money.[15] Therefore, brand loyalty is more important today than perhaps as recently as five years ago, when comparison shopping was in vogue.[16] The environment today is charged with change that requires the minimal investment in time to make a rational consumer choice. The significant increase of women in the workplace[17] and the increased demands placed upon the work force have made time, rather than money, the most precious commodity for many Americans. Brands, therefore, are an efficient means of communicating the packaged meaning described above,"[18] and "color is still the primary purchasing consideration. . . ."[19] In fact, "[c]olor goes

[13] Coleman, Lipuma, Segal & Morrill, Inc., *Package Design & Brand Equity* 6 (1994).

[14] Biel, *supra*, note 5, at RC-6.

[15] Belinda Hulin-Salkin, *Grocery Marketing: Food Stores Turn Shopping Into a Carefully Catered Affair*, Advertising Age, Oct. 3, 1988, at S1, S16-17.

[16] *Id.*

[17] Phyllis Furman, *Grocery Marketing: Redesign Puts Old packages in New Light*, Advertising Age, May 4, 1987, at S20-21.

[18] Biel, *supra*, note 5, at RC-6.

[19] Harold Linton, *Color Forecasting: A Survey of International Color Marketing* 99 (1994).

> immediately to the psyche and can be a direct sales stimulus."[20]

The efficient communication of meaning yields value at the bottom line for the owners of brands. Brands make choice easier for consumers, and, therefore, the creation and maintenance of brand loyalty is the key to economic success in the American and global marketplace. The efficient communication of brand identity so as to facilitate consumer choice is what creates "brand equity" or market value of the brand.[21]

Because the marketplace is vibrant, it is in a state of constant evolution. "Gone are the days of 'any color you want so long as it's black.'"[22] So, too, must the application of the law be vibrant and relevant. To the extent that courts arbitrarily deny protection to color, those who invest in the development of color brands can never rely on their investment in color. *Truck Equipment Service Co. v. Fruehauf Corp., supra,* 536 F.2d at 1215. The net effect is that the value of color as a brand will be reduced to zero, inviting the deception of the consuming public.

Color has enabled many companies to develop products with strong images, instantly recognizable around the world.[23] The Ninth Circuit's decision compromises the investment of such companies in color and invites the competitors to prey upon the consumers who come to rely upon color as a source identifier. This flies in the face

[20] Alsop, *supra*, note 8, at 33.

[21] Biel, *supra*, note 5, at RC-7.

[22] Murphy & Rowe, *supra*, note 2, at 11. *See also, Diamond Watch Co. v. Saginaw Match Co.*, 142 F. 727, 729-730 (CA6 1906) *cert. denied*, 203 U.S. 589 (1906) ("The primary colors, even adding black and white, are but a few. If two of these colors can be appropriated for one brand . . . it will not take long to appropriate the rest.")

[23] Linton, *supra*, note 20, at 147.

of the market reality we each confront daily. The decision below denies the law its proper and practical application to our lives today.

Justice Frankfurter perhaps summed it up best in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 209-210 (1956) when he wrote: "Law does change with times and circumstances . . . [L]aw is not restricted to what is found in Law Reports . . ." *See also, In re Owens-Corning Fiberglas Corp., supra*, 774 F.2d at 1119.

Therefore, in light of the clear statutory language of the Lanham Act and the role color plays in our marketplace *today*, Dr Pepper/Seven-Up Corporation urges this Court to provide unequivocal protection to both the consumer and the owner of color brands by recognizing the registrability of color as a trademark. Accordingly, the Court is respectfully requested to find in favor of Qualitex Company and against Jacobson Products Co., Inc., by holding that color alone may properly be registered as a trademark where the statutory requirements of the Lanham Act are met.

CONCLUSION

The judgment of the court of appeals should be reversed to the extent that the court held that color alone as a matter of law cannot properly be registered as a trademark under the Lanham Act.

Respectfully submitted,

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